No. 87-1387

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WARDS COVE PACKING COMPANY, INC.,
CASTLE & COOKE, INC.

Petitioners,

v.

FRANK ATONIO, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION AS AMICUS CURIAE SUPPORTING PETITIONERS

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September 9, 1988

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QUESTIONS PRESENTED

1. Should "disparate impact" plaintiffs be permitted to challenge facially neutral selection devices used to fill positions in one job category based only on statistics showing that plaintiffs are over-represented in a different job category?

2. In applying the disparate impact analysis, did the Ninth Circuit improperly alter the burdens of proof and engage in impermissible fact finding in disregard of established precedent of this Court?

3. Did the Ninth Circuit commit error in allowing plaintiffs to challenge the cumulative effect of a wide range of alleged employment practices under the disparate impact model?

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CONSENT TO FILING

This Amicus brief is filed pursuant to Supreme Court Rule 36.2, with the written consent of all parties. Letters of consent have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The American Society for Personnel Administration ("ASPA") is the world's largest association of personnel

and human resources professionals, representing over 40,000 members in business, government, and education dedicated to the advancement of personnel and human resource management. Accordingly, ASPA and its members have a keen interest in the development and enforcement of the myriad of laws and regulations which govern many aspects of employment.

As the major professional association of the human resources profession, ASPA is vitally concerned with the orderly evolution of laws defining, in practical terms, the meaning of equal employment opportunity. ASPA has long recognized its special responsibility to support and encourage compliance with fundamental principles of equal employment opportunity in the administration of efficient, workable personnel management systems. ASPA believes that the present case provides an excellent opportunity for this Court to reaffirm the appropriate balance between the compatible goals of providing equal employment opportunities and preserving the right of managers to make legitimate personnel judgments in the best interest of their organizations.

STATEMENT OF FACTS[1]

Respondents are persons of Chinese, Filipino, Japanese and Native American descent who have been employed in fish canning facilities owned by Petitioners in remote, widely separated areas of Alaska (1, 50). Most of the jobs at the canneries are seasonal and temporary and are filled by migrant workers (52, 119). Since summer salmon runs are very short and the fish are extremely perishable, it is

[1] Unless otherwise noted, each of the facts set forth herein is taken from the district court's findings of fact following a nonjury trial. *Atonio v. Wards Cove Packing Co., Inc.*, 34 E.P.D. ¶ 34,437 (W.D. Wash. 1983) (copy appended as Attachment 1 to Petition For Writ of Certiorari herein). References such as "(1, 50)" refer to the numbers of the district court's findings of fact.

essential that the canneries operate at peak production (51, 63). "The slightest mistake in calibrating can size or in retort [cooking] management, for example, could result in a threat of widespread botulism, a disease fatal to humans."[2]

There were two general categories of jobs at Petitioners' canneries. The first, referred to as "cannery" or "laborer" jobs, included production line positions. The second, referred to as "noncannery jobs," included all other departments (82). Most cannery worker jobs did not require employees who were literate or able to communicate effectively in the English language, and none required employees to be available prior to the short, summer salmon run (117). Most of the so-called "noncannery" jobs required both English literacy and early season availability (117). It is the "noncannery" jobs which are at issue in this lawsuit (82).

Respondents Title VII claim alleged unlawful discrimination on the basis of color in Petitioners' selection of employees for the at-issue, noncannery jobs. Cannery workers and laborers at Petitioners' facilities were predominately nonwhite. In these jobs, nonwhites were overrepresented in comparison to the relevant labor supply (105, 107). In noncannery positions, the district court found that whites and nonwhites were employed in percentages which approximated their availability in the relevant labor supply (123). Nevertheless, Respondents contended that the difference in the percentage of nonwhites in cannery jobs versus noncannery jobs supported a finding of unlawful discrimination.

The district court disagreed. It found that many of the jobs at Petitioners' facilities were covered by union contracts, and that Local 37 of the I.L.W.U.—the membership of which was predominately Filipino—provided an over-

[2] *Atonio, supra* at fn.1, 34 E.P.D. at 33,840.

supply of nonwhites for cannery worker positions (84, 103). It found that Petitioners received relatively few applications for noncannery positions from nonwhites (89). It found experience in cannery positions did not qualify employees for noncannery jobs, that there was no opportunity for on-the-job training for skilled, noncannery jobs, and that Petitioners did not promote from within but filled positions by rehiring past employees or hiring new employees from the external labor market (57, 95, 97). In short, the district court found that Petitioners' "cannery workers and laborers do not form a labor pool for other jobs at [Petitioners'] facilities" (110).

The district court's opinion initially was affirmed on appeal[3] but later was reversed by the Ninth Circuit sitting *en banc*.[4] Upon rehearing, the original panel remanded the case to the district court with instructions to consider Respondents' evidence under the "disparate impact" model of employment discrimination.[5]

SUMMARY OF ARGUMENT

Led by the human resources profession, American employers are firmly committed to providing equal employ-

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[3] *Atonio v. Wards Cove Packing Co., Inc.*, 768 F.2d 1120 (9th Cir. 1985)

[4] *Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477 (9th Cir. 1987) (*en banc*).

[5] *Atonio v. Wards Cove Packing Co., Inc.*, 827 F.2d 439 (9th Cir. 1987). The Court should note that while the district court believed "disparate impact" analysis should not be applied to all aspects of Respondents' claim, it took pains to state its opinion as to the "business necessity" of certain employment practices if "disparate impact" were applied. The district court concluded Respondents had failed to prove a "disparate impact" prima facie case or Petitioners had demonstrated "business necessity" with respect to (a) requiring English language literacy for noncannery workers, (b) word-of-mouth recruitment among relatives, (c) the rehire preference, (d) housing workers by department, and (e) feeding workers according to ethnic preferences. *See Atonio, supra* at fn.1, 34 E.P.D. at 33,840-844.

ment opportunities to people regardless of characteristics like color or gender. But in order to work effectively to further the goals of Title VII, employers must have a clear, operational definition of applicable legal rules. And those rules must not be so unworkable that the only practical alternative for employers is to operationalize "equal opportunity" by proportionate hiring of blacks, women and members of other protected groups.

In the wake of this Court's opinion in *Watson v. Fort Worth Bank & Trust*, 56 U.S.L.W. 4922 (June 29, 1988), *vacating* 798 F.2d 791 (5th Cir. 1986), employers are very uncertain about the practical, operational meaning of "disparate impact" theory as applied to review a series of individual, subjective personnel judgments. And they fear that the only manageable way to comply with this new rule will be to hire "by the numbers"—a result which would stand the purpose of Title VII on its head.

The Court should seize the opportunity offered by the present case to restate the rule of *Watson* in terms which provide employers a clear, operational definition of its requirements. Most importantly, those requirements must take into account the practical realities of countless personnel judgments made by fair-minded employers every single day. The Court should adopt the evidentiary standards outlined in the plurality opinion in *Watson* and spell them out in much greater detail, both with respect to the quality of a proper *prima facie* case and the nature of the intermediate burden to be carried by employers.

"Disparate impact" plaintiffs ought to be required to prove that a specific selection criterion disqualified a significantly disproportionate number of individuals because of their membership in a protected class. Where the challenge is directed at a series of subjective personnel judgments, requiring identification of a specific, discrete selection criterion is a particularly important part of the

foundation for a meaningful analysis. Here, Respondents' *prima facie* proof fell far short. Respondents failed to show they were excluded from the at-issue jobs—in fact, the record reflects no adverse impact at all. Instead, Respondents relied entirely on their *over*-representation in jobs *not* at issue. And Respondents failed to show that any specific selection device caused their over-representation in not at issue jobs or denied them the privilege of being over-represented in the jobs at issue. Instead, Respondents relied on a shotgun approach alleging that a legitimate difference in the percentage of nonwhites in at-issue and not at-issue jobs was the result of the "cumulative effect" of a variety of policies and practices. But Respondents never proved that this "statistical stratification" was caused by any particular selection device. Accordingly, the first and third questions presented should be resolved in favor of Petitioners.

Employers defending "disparate impact" challenges to their use of nonstandardized, subjective selection criteria should not bear an intermediate burden of proving the "business necessity" of those criteria. Unlike standardized selection devices, subjective judgments of important personal characteristics like loyalty or tact are not amenable to *a priori* testing to determine whether they will disqualify disproportionate numbers of protected individuals and, if so, to determine their relationship to business goals. Unless an employer's burden of proof could be satisfied simply by stating the opinion that the job relatedness of qualities like loyalty and tact is self-evident, such a burden would be unmanageable and would force employers into the untenable realm of proportional hiring. The Court must reject any evidentiary burden likely to produce this result.

ARGUMENT

A. In the Wake of *Watson*, Employers Must Be Permitted To Judge The Personal Qualities Of Individual Job Applicants On A Case-By-Case Basis Without Being Saddled With Unmanageable Burdens

> It is a standard tenet of personnel administration that there is rarely a single, 'best qualified' person for a job. An effective personnel system will bring before the selecting official several fully-qualified candidates who each may possess different attributes which recommend them for selection. Especially where the job is an unexceptional, middle-level craft position, without the need for unique work experience or educational attainment and for which several well-qualified candidates are available, final determinations as to which candidate is 'best qualified' are at best subjective.

Johnson v. Transportation Agency, Santa Clara County, California, 480 U.S. ___ , 94 L.Ed.2d 615, 636 n.17 (1987) (quoting Brief for ASPA as *Amicus Curiae* in support of Respondents).

As a corollary to the foregoing principle, personnel professionals also know that the business of selecting employees from a pool of well-qualified finalists is not a simple, mechanical process. Far from it. In order to identify individuals who will best serve the needs of their enterprises employers must approach the task with flexibility and creativity. The scarcity of perfect applicants means that each individual's strengths must be discounted by his or her weaknesses. Imperfect applicants must be judged in relation to one another and measured against the employer's reasonable definition of job requirements rather than measured against some external yardstick of perfection. At the same time, employers must be prepared to recognize and credit unique or outstanding qualities pre-

sented unexpectedly. While the process of final selection can be disciplined by advance thinking about the kind of individual who is likely to succeed, these prejudgments must often give way to new information, the qualities of available applicants and the pressures of time.

Indeed, in a "service economy" where intangible personal characteristics are often critical to the definition of a quality employee, a judge's selection of a law clerk is an excellent model for considering the practical dynamics of employee selection. Each candidate for a clerkship must possess certain minimum qualifications summarized by the fact that he or she has earned a degree from an accredited law school. Some judges may require one year or more of prior clerkship experience. But beyond these narrow, "objective" criteria, the judge's selection decision must be based on a series of subjective judgments about a wide range of factors. What was the quality of the candidate's law school, course selections and academic performance? How valuable was the candidate's prior clerkship experience? What is said by those recommending the candidate's selection and how much weight should be attributed to their views? Perhaps most importantly, what does the selecting judge see and hear when he or she looks into the eyes of a hopeful candidate during a final interview? Is there common sense, commitment and clear thinking or distant self-importance?

Well-qualified candidates almost always outnumber the positions available. Minimum qualifications are almost always satisfied. Choosing the clerk who will work most effectively with the selecting judge is of critical importance to the success of work in the upcoming term. What selection criteria will identify the very best clerk? Years later, will the selection decision be deemed illegitimate according to standards of equal employment opportunity which can be applied only after the total number of clerks selected is large enough to support a judgment about the significance of an overall statistical imbalance?

This Court's holding in *Watson v. Fort Worth Bank & Trust*, *supra*, (hereinafter "*Watson*"), changed those standards in ways which appear to be fundamental but which have not yet been fully revealed. Prior to *Watson*, selecting officials knew that candidates must not be treated differently because they are black or female or members of other protected groups. Employers knew they could not screen out candidates who, for example, lacked certain educational attainment or experience if those criteria excluded a disproportionate number of protected individuals but did not bear "a manifest relationship to the employment in question." *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). But, prior to *Watson*, this Court had "consistently used conventional disparate treatment theory . . . to review hiring and promotion decisions that were based on the exercise of personal judgment or the application of inherently subjective criteria." *Watson*, 56 U.S.L.W. at 4925. Accordingly, employers were confident of their freedom to judge the personal qualities of individual candidates as long as those judgments were not tainted by unlawful prejudice.

Since *Watson*, that freedom is in doubt. *Watson* held that, after a period of years, individual personnel judgments may be deemed unlawful if, viewed collectively, members of a protected group were selected less often than others. To return to our clerkship model, if a judge's hiring decisions over the years selected male candidates significantly less often than female candidates, rejected males would be entitled to relief in the absence of proof of the "business necessity" of the criteria which produced those results.

The *Watson* result troubles employers for two reasons. The first is the fact of great uncertainty about the standards which will govern a retrospective "disparate impact" analysis of a series of individual, subjective personnel judgments. The second is the prospect that, once defined clearly, those standards will prove unmanageable unless employees are chosen "by the numbers," thus avoiding

statistical imbalances that can trigger a "disparate impact" analysis.

The case before the Court requires a clear, operational definition of the new rule announced in *Watson*. Without one, employers face the chilling uncertainty of knowing that something called "disparate impact" theory may be applied to individual personnel judgments but not knowing whether they should act in accordance with the evidentiary standards set forth in the Court's plurality opinion or the fundamentally different view expressed in the concurring opinion authored by Justice Blackmun. ASPA urges the Court to spell out the rule of *Watson* in terms which provide clear guidance and which preserve the right of employers to make legitimate, subjective personnel judgments.

B. Justice O'Connor's Formulation Of Disparate Impact Analysis In *Watson* Is Based On Principles Essential To A Workable Application Of The Model

If the "disparate impact" approach may be used to challenge individual, subjective personnel judgments, ASPA urges the Court to adopt the evidentiary standards for such cases outlined in the plurality opinion in *Watson*. That opinion expresses important principles which, when properly applied, should permit a workable balance between legitimate employer discretion and the goal of equal employment opportunity.

1. Because Statistical Imbalances Alone Do Not Support A Presumption Of Unlawful Discrimination, Evidence Of An Adverse Impact Must Be Linked To A Discrete Selection Criterion

Justice O'Connor's discussion of evidentiary standards in *Watson* began by recognizing a problem inherent in Title VII challenges based on statistical disparities.

> It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. *It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances* in the composition of their work forces.

Watson, 56 U.S.L.W. at 4926 (citation omitted) (emphasis added). Indeed, Title VII expressly disclaims any requirement that employers prefer members of protected groups in order to avoid or compensate for numerical imbalances. 42 U.S.C. § 2000e-2(j).[6]

Since a statistical imbalance must be linked to a specific cause in order to have any meaning in a Title VII case, the first, crucial burden borne by a "disparate impact" plaintiff is "isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." *Watson*, 56 U.S.L.W. at 4927. In other words, our hypothetical male clerkship candidate must not only show that disproportionately few males were chosen—a preliminary fact which itself is no evidence of unlawful discrimination—but must also identify specifically what his prospective judge did that caused the disqualification of more male clerks than was expected by chance. Unless the focus is narrowed in this way, no foundation exists on which to base a proper "disparate impact" analysis.

At this very first step of the analysis the rule intended by the Court in *Watson* can become blurred—and the bur-

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[6] "A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of . . . have carefully stated on numerous occasions that Title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection(j) is added to state this expressly." 110 Cong. Rec. S 12723 (daily ed. June 4, 1964), Statement of Senator Humphrey, *reprinted in* the EEOC's Legislative History of Title VII and XI of Civil Rights Act of 1964, at 3005.

den on employers can become unmanageable—in the absence of a clear definition of the category of selection devices which are proper targets of a disparate impact attack. The Court's opinions in *Watson* discuss the impact of employment "tests," "requirements" and "criteria," but also speak in terms of selection "practices," "procedures," and "systems." The former set of terms describes discrete selection devices which can be identified specifically and analyzed individually. The latter set describes aggregations of variables, each of which may include some factors which have had an impact on the selection of certain employees and other factors which have not.

"Disparate impact" analysis should only be applied to review discrete selection criteria which can be identified and analyzed individually. "Disparate impact" plaintiffs must not be permitted to challenge multifactor selection "procedures" or "systems" as if they were a single, indivisible "cause" of a statistical imbalance. *See, e.g., New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979); *see also AFSCME v. State of Washington*, 770 F.2d 1401, 1405 (9th Cir. 1985) (Kennedy, J.) ("Disparate impact analysis is confined to cases that challenge a specific, clearly delineated employment practice applied at a single point in the job selection process.")

The reasons for imposing such a limitation are obvious. Permitting a "shotgun" attack against an employer's overall selection system would render meaningless the requirement of showing a causal link between a particular selection device and an adverse impact. Because, as Justice O'Connor wisely observed, it would be "unrealistic to suppose that employers can . . . discover and explain, the myriad of innocent causes" that may have led to such a result, plaintiffs must bear the burden of identifying the specific criterion they believe caused unjust discrimination. *Watson*, 56 U.S.L.W. at 4926. For example, if our hypothetical male clerkship candidate could simply attack the collective impact of all the selection criteria used by the judge, it

would always be the case that somewhere among that universe of criteria would be the criterion which caused the adverse impact. Without specification of a discrete criterion, proof of causation would consist of nothing more than the simple claim that the judge's criteria caused the impact. Moreover, shotgun attacks would require employers to justify many—perhaps all—facets of their selection systems even if an adverse impact was the product of only one element of that system. No purpose would be served by requiring our hypothetical judge to demonstrate the "business necessity" of, for example, a preference for candidates from ivy league law schools or candidates with clinical experience if in reality it was the recommendations of law school professors that caused the selection of a disproportionate number of women.

Similarly, a "disparate impact" plaintiff should not be permitted simply to attack the general practice of making a final selection decision based on a personal interview, as if the interview itself was a selection criterion. Once again, the entire concept of a causal link between a specific selection device and some adverse impact would be rendered meaningless by this approach. The selection criterion that produced the impact may or may not have been among those applied during the interview. If it is not, analysis of the legitimacy of interviews as a selection device is completely useless. And even if the operative criterion was applied during the interview, analysis of the "business necessity" of the criterion cannot begin until it is identified. Instead of permitting plaintiffs to attack employers' judgments in a vague and general way, all of the criteria applied during personal interviews should be identified—a single interrogatory will accomplish this result—and courts should then require plaintiffs to show which of those criteria caused the numerical imbalance observed.

If an employer cannot identify the criteria it used to distinguish candidates, the "disparate impact" model of analysis should not be applied. This does not mean that

an employer with a standardless selection system would prevail. Rather, it simply means that the review of such an employer's selection decisions should proceed under the "disparate treatment" model.

Contrary to Justice Blackmun's concern that the lack of specific selection criteria might "shield [an employer] from liability," an employer's inability to articulate the basis for its selection decisions would leave it vulnerable to a variety of attacks. *Watson*, 56 U.S.L.W. at 4931, n.10 (Blackmun, J., concurring). Indeed, that inability may require a judgment against the employer if a "disparate treatment" plaintiff had made out a *prima facie* case of discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981) ("If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption [of unlawful discrimination], the court must enter judgment for the plaintiff because no issue of fact remains in the case."). If unable to identify its selection criteria, the employer may even be in a worse position than if, under the "disparate impact" model, it bore the onerous "burden of establishing that the absence of specified criteria was necessary for the proper functioning of the business." *Watson, supra*, at 4931 n.8. Thus, the appropriateness of the "disparate impact" approach does not turn on an unprincipled prediction about whether plaintiffs or employers are more likely to prevail. Rather, the important, enduring principle is that Congress never intended Title VII to require employers to adopt any external set of hiring criteria, much less an idealized set of "objective criteria carefully tailored to measure relevant job qualifications." *Watson*, 56 U.S.L.W. at 4931 (Blackmun, J., concurring). *See, Steelworkers v. Weber*, 443 U.S. 193, 207 (1979) (Congress did not intend to limit traditional business freedom, even with respect to certain race-conscious affirmative action).

This Court has recognized "[t]he dangers of embarking on a course . . . where the court requires businesses to

adopt what it perceives to be the 'best' hiring procedures. . . ." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 (1978). Instead, Title VII enforcement should accept employers' selection devices for what they are and apply standards of review appropriate to test the legitimacy of the device chosen by the employer. If discrete tests or criteria have been used which systematically excluded protected individuals, "disparate impact" analysis may be applied in accordance with the rule of *Watson*. If no such tests or criteria can be identified, "disparate impact" analysis is not a useful tool and, instead of forcing employers to adopt judicially approved selection devices, their employment decisions should be reviewed under the "disparate treatment" approach.

2. The First and Third Questions Presented Should Be Resolved In Favor of Petitioners

A straightforward application of the foregoing principles requires that the first and third questions presented be answered in favor of Petitioners.

The third question presented should be addressed first because it goes to the heart of the problem—namely, that Respondents failed to show any causal link between a discrete selection device and a significant, disparate impact against minority applicants. Respondents simply alleged that the over-representation of minority employees in the *not* at-issue, cannery worker jobs resulted from the *cumulative* effect of a variety of employment practices.[7] Despite the Ninth Circuit's apparent recognition that the "disparate impact" model should *not* authorize a "wide ranging attack on the cumulative effect of a Company's employment practices.' *Spaulding* [*v. University of Washington*, 740 F.2d 686, 707 (9th Cir. 1984)]", the court's *en*

[7] The insufficiency of this allegation, even if a causal link to a specific criterion were proven, is discussed immediately below. *See, infra*, at pp. 17-19.

banc opinion proceeded to hold that "practices which cause adverse impact may be considered individually *and collectively*." *Atonio, supra* at fn.4, at 1486 n.6 (emphasis added). On remand, the original panel applied this holding in a way which relieved Respondents of their proper evidentiary burdens and placed unmanageable burdens on Petitioners.

> The statistics show only racial stratification by job category. This is sufficient to raise an inference that *some practice or combination of practices* has caused the distribution of employees by race and to place the burden on the employer to justify the business necessity of the practices identified by the plaintiffs.

Atonio, supra at fn.5, at 444 (emphasis added).

The Ninth Circuit thus proceeded with its "disparate impact" analysis in the absence of proof of any causal link between an adverse impact and a specific selection device. This rule would mean that every employer with a disproportionately high number of protected individuals in *any* job category would be obligated to justify *every* selection device—even those used for different job categories—which plaintiffs might allege is somehow related to that numerical imbalance. The more employment practices plaintiffs indict, the more their employers must defend. And if the justification for any particular practice falls short, the employer would risk liability regardless of the actual adverse impact of that practice. In the present case, for example, Petitioners demonstrated the business necessity of their "rehire preference" to the satisfaction of both the district court and the Court of Appeals but nevertheless risk liability on the basis of practices with doubtful causal connections to the proportion of whites and nonwhites in various jobs—practices like referring to a fish butchering

machine by the name given it by its inventor (the "Iron Chink").[8]

The courts below erred in permitting a challenge based on cumulative effects and without proof of causation. That error should be reversed. With respect to the first question presented, the error of the lower courts was even more extreme.

This Court's plurality opinion in *Watson* restated the obvious point that a causal link must be established between a specific selection device and a significant impact which is *adverse* to protected individuals.

> Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the *exclusion* of applicants for jobs or promotion because of their membership in a protected group.

Watson, 56 U.S.L.W. at 4927 (emphasis added). Below, Respondents made no showing that any selection device caused the disproportionate exclusion of minorities from at-issue jobs. Indeed, the district court found that minorities were *not* under-represented in the at-issue jobs and that "in some instances, *non*whites are *over*represented in the jobs taken on a department-by-department basis." *Atonio, supra* at fn.1, 34 E.P.D. at 33,829 (finding of fact 123) (emphasis added).[9] Rather than demonstrating an adverse impact with respect to at-issue jobs, Respondents' entire case hung on their ability to treat the over-representation of minorities in *not* at-issue jobs as the proper

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[8] See, *Atonio, supra* at fn.1, 34 EPD at 33,826 (finding of fact 65).

[9] This was one of numerous findings of fact not credited by the court below, a practice in direct conflict with this Court's decision in *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

foundation for a "disparate impact" analysis of devices used to select employees for different jobs.

Respondents' contorted approach makes a shambles of the theory on which they rely. "Disparate impact" theory demands some connection between specific employment devices and the hiring decisions produced by those devices—otherwise the indispensable element of causation is nonexistent. The theory demands some demonstration of an impact that is adverse—otherwise the claim is properly one of reverse discrimination brought by a different set of plaintiffs. And the theory requires proof of an adverse impact with respect to jobs at issue—otherwise there would be no limit to the burden borne by employers. If adverse impact in one job category could be used to challenge the selection devices used for an entirely different job category, a showing of adverse impact *anywhere* in a facility would require proof of the "business necessity" of selection devices used *everywhere* in the facility. This would mean that even if our hypothetical judge selected male and female clerks in perfect proportion to their availability, the judge still would have to demonstrate the "business necessity" of every criterion used to select law clerks if, for example, he or she had employed a disproportionately high number of female secretaries.

The only conceivable rationale which may have led the Ninth Circuit to rely on the overrepresentation of nonwhites in one job category to require proof of the "business necessity" of criteria used to select employees in a different category in which nonwhites were *not* underrepresented—and it would have been a twisted, faulty rationale—would have been a rationale suggesting that the high percentage of nonwhite cannery workers defined the "expected" percentage of nonwhites among noncannery workers. If this was the rationale, it was flat wrong. The district court specifically found that the two categories of jobs required different sets of skills and qualifications and that cannery workers were *not* part of the available labor

pool for noncannery jobs.[10] This Court has held consistently that legitimate expectations about minority representation in particular job categories depend on the availability of individuals with the qualifications for the jobs in question.

> [A]nalysis of a more specialized labor pool normally is necessary in determining under-representation in some positions. If a plan failed to take distinctions in qualifications into account in providing guidance for actual employment decisions, it would dictate mere blind hiring by the numbers, for it would hold supervisors to "achievement of a particular percentage of minority employment or membership . . . regardless of circumstances such as economic conditions or the number of qualified minority applicants . . ." *Sheet Metal Workers v. EEOC*, 478 U.S. ___, 106 S.Ct. 3019 (1986) (O'Connor, J., concurring in part and dissenting in part).

Johnson v. Transportation Agency, supra, 94 L.Ed.2d at 633.

As a matter of law, statistical evidence showing a numerical imbalance among employees filling one category of jobs cannot support a "disparate impact" assault on devices used to select employees for a different category of jobs. Accordingly, the first question presented should be decided in favor of Petitioners.

C. Employers Should Not Bear the Burden Of Proving the Business Necessity of Nonstandardized Selection Criteria

Prior to *Watson*, it was sometimes said that a distinguishing feature of "disparate treatment" and "disparate

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[10] *Atonio, supra* at fn.1, (findings of fact 117 and 110). Once again, the failure to credit these findings cannot be justified. *See, Anderson v. Bessemer City, supra* at fn.9.

impact" analysis was the nature of the intermediate burden on the employer once a plaintiff made out a *prima facie* case. In a "disparate treatment" context, the employer's intermediate burden is not a burden of proof but rather a burden of "articulation"—to explain clearly the nondiscriminatory reasons for its actions. *Burdine, supra*, at 255 n.9 and 260. In "disparate impact" cases challenging standardized selection criteria, this Court has characterized the employer's intermediate burden variously as one of "showing"[11] or "demonstrating"[12] or "establishing"[13] or "proving"[14] that its criterion bears "a manifest relationship to the employment in question."[15]

Now that *Watson* has opened an entire new category of employer activity to "disparate impact" review, characterizations of the employer's intermediate burden arising in other contexts should not be applied automatically to this new category of cases. As discussed below, because of a fundamental difference between evidence available to employers to justify standardized versus nonstandardized criteria, the employer's intermediate burden should not rise to the level of a burden of proof by a preponderance of the evidence. Where "disparate impact" theory is applied to nonstandardized, subjective personnel judgments, employers should bear an intermediate burden of production similar to that in a "disparate treatment" case. In these new cases, the intermediate burden on employers should be to produce evidence of a "manifest relationship" between their nonstandardized criterion and a legitimate business need.

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[11] *Griggs, supra*, at 432.

[12] *Beazer, supra*, at 587.

[13] *Id.*, at 587 n.31.

[14] *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

[15] *Griggs, supra*, at 425.

1. By Their Very Nature, Nonstandardized Selection Criteria Are Not Amenable to the Techniques By Which the Job Relatedness Of Standardized Criteria Is Proven Or Disproven

In a "disparate treatment" case, the ultimate issue is whether a selecting official intended to discriminate against an individual based on his or her membership in a protected class. *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). The intent to discriminate is, of course, something the decision maker knows about at the time an employment decision is made. Discriminatory intent can be recognized and abandoned by decision makers seeking to comply with the law. In short, the "disparate treatment" approach embodies standards which leave no doubt about what the law requires and afford employers the opportunity to judge their behavior at the time an employment decision is made and to conform it to the law.

Similarly, in a "disparate impact" case challenging a standardized selection device—one, as in *Griggs*, which systematically disqualified a disproportionate number of protected individuals—an employer is able to assess its position before the device is actually used. By definition, a standardized selection device is one which will apply precisely the same measure in precisely the same way to as many candidates as necessary. A standardized device, therefore, can be tested prior to its implementation to determine whether it will impact adversely members of a protected group. If such an impact is observed, it can also be tested to determine whether it is a reasonably good predictor of success on a job or is otherwise justified by "business necessity." Accordingly, employers can assess a standardized device *a priori* and decide whether to implement or abandon it. Indeed, the federal government has regulated this process for many years by means of guidelines instructing employers on how to carry out this assessment. See, Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1978).

However, an employer judging important personal qualities of individual applicants based on nonstandardized, subjective criteria is in a fundamentally different position. By definition, nonstandardized devices—for example, judgments during an interview about a candidate's loyalty or tact—do not apply precisely the same measure in precisely the same way time after time. No matter how detailed the guidelines, different interviewers will have somewhat different notions of the meaning of nonstandardized criteria like loyalty and tact. The words they use to test these attributes will vary in subtle ways. Their assessments will depend to some extent on the course and content of conversation during the interview. Judgments may vary depending on whether the conversation stumbles into complex or controversial topics, whether the prior interviewee seemed wonderful or impossible, whether the interviewer is eager to meet a potential employee or is bored with a lengthy selection process, and a host of other uncontrolled variables.

Under these circumstances, it would impose an unmanageable burden on employers to require them to *prove* that a nonstandardized criterion like loyalty or tact was essential to good performance on the job. For example, even if our hypothetical judge in search of a law clerk had the time to "pre-test" his or her judgments of loyalty and tact on a group of one hundred law school graduates to determine whether an adverse impact would result, that exercise would be of precious little value because the judge could not control the application of those nonstandardized criteria to the next one hundred candidates so as to be confident that the results would be the same.

Moreover, how would our judge prove the "business necessity" of qualities like loyalty or tact? Since judgments of nonstandardized criteria cannot be quantified with confidence, it would be impossible to construct a meaningful historical record which compared a clerk's loyalty or tactfulness "scores"to other scores rating the clerk's job per-

formance.[16] If the judge had consistently hired clerks based, in part, on an assessment of their loyalty and tact, the only way to prove the necessity of these criteria would be to abandon them and watch for demonstrably inferior performance by those newly hired.[17]

The practical impossibility of constructing a meaningful proof of the job relatedness of nonstandardized selection criteria contrasts sharply with the practical necessity of proving the job relatedness of standardized tests. The only way for employers to demonstrate the job relatedness of paper and pencil tests is by means of some form of validation study. Assuming the study is not itself defective, its results will constitute proof, at a stated level of confidence, that the test is either related to the jobs in question or that it is not. The all-or-nothing quality of the results of such studies shrinks to the vanishing point the

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[16] Constructing such a record would be made even more difficult by the need to create a standardized measure to rate the quality of a clerk's performance. As the plurality pointed out in *Watson*:

> [S]uccess at many jobs in which such qualities [including loyalty and tact] are crucial cannot itself be measured directly. Opinions often differ when managers and supervisors are evaluated, and the same can be said for many jobs that involve close cooperation with one's co-workers or complex and subtle tasks like the provision of professional services or personal counseling.

Watson, 56 U.S.L.W. at 4926.

[17] Even this approach is only a theoretical, impractical possibility because (1)criteria like loyalty, tact and so on would have to be abandoned only one at a time in order to test the effect of each on performance, and (2)such a series of tests could not be completed in time to respond to a "disparate impact" challenge, particularly if only a small number of clerks were hired each year.

It should be noted that each of the practical problems faced by our hypothetical judge would be multiplied dramatically in the context of a large employer with a large number of selecting officials, each doing his or her best to judge critical personal qualities of a variety of applicants.

difference between a burden of producing evidence and a burden of proof. Thus, in the case of standardized selection devices, it is understandable that courts have sometimes required "proof" rather than "evidence" of job relatedness.[18]

Reasonably available evidence of the job relatedness of subjective, nonstandardized criteria typically will be suggestive rather than dispositive. In many cases, to impose a burden of proof of "business necessity" with respect to this category of selection criteria would be to outlaw them. In mandating equal employment opportunity, Congress never intended to outlaw the use of business judgment in hiring or impose unmanageable burdens on employers to justify judgments not tainted by an intent to discriminate against members of protected groups.

2. The Plurality Opinion In *Watson* Outlines Evidentiary Standards Which Recognize the Special Nature Of Legitimate, Nonstandardized Criteria

In light of the practical dilemmas that would be faced by employers forced to prove the business necessity of subjective personnel judgments, the plurality in *Watson* interpreted the "manifest relationship" test of *Griggs* in a way that was perfectly appropriate. The plurality opinion properly rejected the notion that the *Griggs* test "impl[ied] that the ultimate burden of proof can be shifted to the defendant." *Watson*, 56 U.S.L.W. at 4927. Instead, the plurality opinion limited the intermediate burden on employers in cases of this type to a burden of production.

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[18] ASPA does not mean to cast doubt on the plurality's important observation in *Watson* that this Court has never required employers to "introduce formal 'validation studies' showing that particular criteria *predict actual on-the-job performance.*" *Watson*, 56 U.S.L.W. at 4928 (emphasis added). As the plurality illustrated with examples including *Washington v. Davis*, 426 U.S. 229, 250 (1976), the ability of a test to predict actual on-the-job performance is not a necessary element of the Court's definition of either test validity or job relatedness. See also, *Id.*, at 256 (Stevens, J., concurring).

> Thus, when a plaintiff has made out a *prima facie* case of disparate impact, and when *the defendant has met its burden of producing evidence that its employment practices are based on legitimate business reasons*, the plaintiff must show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship.

Id. (citing *Albemarle Paper Co., supra*). The plurality concluded that imposing a greater intermediate burden on employers would be to require more—in the case of nonstandardized criteria not amenable to objective proof—than the Court had required in other contexts. See *New York City Transit Authority v. Beazer*, *supra* (methadone users properly excluded from nonsafety-sensitive jobs based on simple articulation of rationale for personnel policy); *Washington v. Davis*, *supra* (written test justified by simple rationale that test which predicted success at police training academy was "manifestly related" to police work despite absence of demonstrated link between test and actual performance as a police officer).

The plurality was also correct in recognizing that:

> [i]n the context of subjective or discretionary employment decisions, the employer will often find it easier than in the case of standardized tests to produce evidence of a 'manifest relationship to the employment in question.' It is self-evident that many jobs, for example those involving managerial responsibilities, require personal qualities that have never been considered amenable to standardized testing.

Watson, 56 U.S.L.W. at 4928 (quoting *Furnco, supra*, at 578). This conclusion simply recognized that, unlike complicated paper-and-pencil examinations, the job relatedness

of certain nonstandardized criteria is apparent on their face. Compare the process for analyzing the job relatedness of a standardized written exam and a nonstandardized criterion like tactfulness. There is no way to draw an immediate conclusion about the job relatedness of a ten page test booklet containing dozens of questions. First, one must ask what knowledge did those questions seek? Was the format bilingual or did it automatically exclude non-English speaking people of color? What was the relationship, if any, between the subject matter of each question or the totality of the questions and the job at issue?

By contrast, there is nothing complicated or indirect about judging the "manifest relationship" between a personal quality like tactfulness and any position in which an employee is obligated to work with other people. This is a matter that can be judged as soon as the criterion and the position are identified. While some may quibble about just how important it is to employ a person with tact rather than a person who is rude, the relationship between the criterion and the work is self-evident.

Justice Blackmun's response to the plurality opinion on this point is misguided. Justice Blackmun wrote:

> It would make no sense to establish a general rule whereby an employer could more easily establish business necessity for an employment practice, which left the assessment of a list of general character qualities to the hirer's discretion, than for a practice consisting of the evaluation of various objective criteria carefully tailored to measure relevant job qualifications. Such a rule would encourage employers to abandon attempts to construct selection mechanisms subject to neutral application for the shelter of vague generalities.

Watson, 56 U.S.L.W. at 4931 (footnote omitted).

In fact, it does make sense that an employer who chooses to implement a relatively complicated, standardized paper-and-pencil test may have some difficulty explaining the relationship between that test and good performance. It does make sense that the Duke Power Company had more difficulty showing the business necessity of its written qualifying exam than it would have had explaining why it wanted employees with common sense or ambition or any other personal quality the value of which is self-evident. Some employers may choose to shoulder a heavier burden because use of a standardized device has special value in their particular circumstances—for example, as a rough screen for large batches of applicants too numerous to interview. The plurality opinion in *Watson* simply recognized that relatively sophisticated, standardized selection devices may require analyses of job relatedness that are more sophisticated than those required for common sense, subjective criteria.

Justice Blackmun's complaint also seems to ignore some compelling realities of employee selection. As a practical matter, employers are not able to choose freely between selection devices which are "objective" and "neutral" and those which are "subjective" and "discretionary." Certain personal qualities "have never been considered amenable to standardized testing." *Watson*, 56 U.S.L.W. at 4928. If employers are to assess these qualities—and, of course, they must—they must not be saddled with unmanageable risks. Justice Blackmun's approach failed to address in a practical way how employers would manage an intermediate burden of proof of the "business necessity" of nonstandardized criteria. He cited an *amicus* brief filed by the American Psychological Association in support of Ms. Watson suggesting that such criteria are amenable to "psychometric scrutiny" but did not explain how such scrutiny would work and did not recognize the great expense of such a program if, indeed, it is workable at all. Justice Blackmun's approach did not deal with the likelihood that

employers would be forced to avoid the expense and burden of psychometrics by simply hiring "by the numbers." In fact, Justice Blackmun relied on Professor Bartholet's discussion of the feasibility of validating nonstandardized assessments, a discussion in which Professor Bartholet recognized that "quota or racially proportionate hiring" may be the result and, indeed, concluded that racially proportionate hiring "seems an appropriate solution." Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945, 1026-7 (1982).[19]

3. The Second Question Presented Ought To Be Resolved In Favor of Petitioners

On remand from the decision *en banc*, the Ninth Circuit panel cited Respondents' allegation that "the lack of objective job qualifications and the consequent hiring on the basis of subjective evaluations has an adverse impact on nonwhites in the canning industry." *Atonio, supra* at fn. 5, at 446. The panel's discussion of this claim, however, is somewhat confusing in that it appears to direct the district court to "analyze whether these qualifications were actually applied in a nondiscriminatory manner." *Id.* This

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[19] We believe that the minority opinion in *Watson* was particularly misguided in suggesting that the "business necessity" of a selection device may be disproven by evidence that, in a particular case, it "failed in fact to screen for the qualities identified as central to successful job performance." *Watson*, 56 U.S.L.W. at 4930 n.6. The opinion noted that one of Ms. Watson's competitors, Mr. Kevin Brown, performed poorly after he was selected for the position sought by Watson. Such anecdotal evidence should carry no weight in judging the legitimacy of a selection device. The legitimacy of a college-degree requirement, for example, should be unaffected by the fact that a particular college graduate failed in a job after being selected over someone without a college degree. Standing alone, an individual performance says nothing about whether the selection device was legitimate or effective. The rejected nondegree candidate may have failed in the job much more quickly or seriously. An effective selection device promises to be successful in the long run—it does not guarantee successful performance by each and every employee selected.

appears to be an analysis appropriate to a "disparate treatment" case. Yet, the panel's discussion of subjective criteria closed with the statement "[f]inally, and most importantly, the court must make findings as to the job-relatedness of the criteria actually applied." *Id.*

Despite this apparent confusion, one thing is clear. If the challenged practice of using subjective selection criteria is analyzed below according to the theory of "disparate impact," the Ninth Circuit has held that Petitioners must "prove the job relatedness or business necessity of the practice." *Id.*, at 442. In fact, Petitioners should never have to address the issue of business necessity because, as discussed in Section B above, Respondents have neglected their *prima facie* burden of proving a causal link between a specific subjective criterion and a significant adverse impact.

Nevertheless, if this matter is remanded for any purpose which may implicate the matter of Petitioners' intermediate burden, this Court ought to issue clear instructions. If the subject of Respondents' "disparate impact" challenge is a nonstandardized, subjective selection criterion, Petitioners' intermediate burden should be to produce evidence of a "manifest relationship" between that criterion and a legitimate business need.

CONCLUSION

For all of the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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September 9, 1988